No. 13,439

IN THE

United States Court of Appeals

For the Ninth Circuit

SHIPOWNERS AND MERCHANTS TUGBOAT COMPANY, a corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S CLOSING BRIEF.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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I.

THIS CASE DOES NOT INVOLVE THE DOCTRINES OF "RES INTER ALIOS ACTA" OR "REPARATION FROM A COLLATERAL SOURCE".

Appellee continues to argue that the sale of the GOLDEN GATE was "res inter alios acta," and quotes the Restatement of Torts on reparation from a collateral source. In support of that argument, appellee then quotes and relies upon a *dissenting* opinion in a case whose *decision* was directly in favor of appellant here.

The quoted text of the Restatement and the cases cited in Judge Clark's dissenting opinion in *Aguiline v. Eagle Oil Co.*, 153 F.(2nd) 869 (pp. 10 to 14 of appellee's brief) show that the rule on "reparation from a collateral source" relates solely to two basic situations:

1. Where because of insurance or other contract made by the injured party *before* the tort, the injured party receives compensation, he may nevertheless recover.

2. *Gifts* to the injured party *after* the loss do not reduce or mitigate the liability of the tort-feasor.

Neither situation exists in this case. The sales proceeds of the GOLDEN GATE were *not* received by virtue of an insurance policy or a contract of some sort made before the collision. They were received as the result of two events happening *after* the accident. One was the voluntary act of the appellee in its sovereign capacity, in setting a fixed sale price for all C-2 vessels. Incidentally, this price was not merely a floor or minimum, but was the *only* price at which a C-2 could be sold.

The other event was the sale, under that statute, to the Chilean Line, which paid the statutory price. Appellee seems to argue that the "willingness" of the buyer to pay the full price and repair at its own expense was a sort of "gift" from the Chilean Line to the United States, within the meaning of the rule on reparation from collateral sources. Nothing could be farther from the truth. The price voluntarily established by the Government was set low enough to enable these surplus vessels to be sold readily, and was enough of a bargain that the buyer was satisfied to pay the statutory price for the GOLDEN GATE. There was no "gift" to the United States in any sense of the word.

There is no magic in the phrase "reparation from a collateral source." It does *not* automatically eliminate from consideration everything done between the injured party and third persons after the tort. It does not repeal or modify the rule that the injured party must do what he can to mitigate the damages. In doing so, he must deal with third persons, and his acts in that regard are relevant and material to the quantum of damages. For example, if he is having his property repaired, he must get the lowest price he can. If he is selling the damaged property, he must get the highest price reasonably available.

If a shipowner received repair offers of $5,000 from A, $3,000 from B, and $2,500 from C, all reputable firms agreeing to do the same identical work, he must take the lowest bid, and cannot hold the tort-feasor for more than $2,500. Appellee apparently would argue that C's willingness to do the work cheaper than A or B was a "gift" from C, and that $5,000 should be recovered. Merely to state the contention is to reveal its absurdity.

Nobody paid insurance to the Government here, or continued payments under a pre-collision contract, or made a gift to the United States. The appellee voluntarily set a single bargain price for all C-2 vessels, and then sold this damaged vessel for the full statutory price. We do not understand why the eyes of the law must be closed to this transaction, merely because it involved a third party, and appellee has not made out a case by reference to a rule which is designed for an entirely different situation.

II.

THE AUTHORITIES SUPPORT APPELLANT'S POSITION.

We cited cases in our opening brief to establish two basic ideas:

1. That events occurring *after* a tort may bear materially on the quantum of recoverable damages and may reduce or eliminate the amount which would otherwise have been recoverable.

2. That there is no one fixed, arbitrary yardstick for measuring damages in all cases. That particular method should be used which, under the circumstances, most nearly arrives at the ultimate goal of measuring damages so as to make the injured party whole—no more and no less.

Appellee's attempted distinction of the cases cited in our opening brief does not contest the propriety or validity of those two basic rules, but points out that none of our citations involved the particular set of facts and issues here presented. We cheerfully concede that the

exact issue now before this Court is one of first impression. We have never contended that there was a decision in the books "on all fours" with this case.

The basic principles laid down in the cited cases, however, must be applied here, with *restitutio in integrum* as the ultimate goal. Those cases, therefore, are in point to the extent that they hold:

1. The injured party should be made whole from actual loss sustained, but *is not entitled to make a profit.*

2. There is no particular sanctity or vested right in any one *method* of measuring the actual loss. That method is to be used which most fairly and accurately measures *the actual loss* and makes the injured party whole.

3. Events occurring after the tort which liquidate or fix the amount of actual loss are relevant and material. The *cause of action* vests at the time of the tort, but the *quantum* of recoverable damage is measured at time of trial *in the light of the situation then existing.*

4. A sale of the damaged article after the tort is not reparation from a collateral source, but is a transaction which helps to fix the actual pecuniary loss of the owner.

The only cases cited by appellee are *The Nantasket,* 290 Fed. 813, and the dissenting opinion in the *Aguiline* case, 153 F.(2nd) 869 (supra).

In *The Nantasket,* the damaged vessel was not sold alone, but as part of a group of several vessels, there being a lump sum for the entire group. Such a sale of course shed no light on the diminution of the damaged ship's value, and was properly disregarded. Here, how-

ever, the damaged vessel was sold by itself, and the Government admits that it was sold for the exact price at which it *would* and *could* have been sold had there been no damage at all.

Interrogatory No. 11 (Apostles, p. 12) reads:

> "Is it not true that the GOLDEN GATE was sold for the same price at which she could and *would* have been sold had there been no collision damage?"

The Government's answer was "Yes" (Apostles, p. 13).

Paragraph IX of the Stipulation of Facts (Apostles, p. 17) and of the Findings (Apostles, p. 24) recites that the price received for the GOLDEN GATE was "the *only* legal price at which the SS GOLDEN GATE could have been sold by libelant."

In the *Aguiline* case, 153 F.(2nd) 869 (2nd Cir.), (cert. den. 328 U.S. 825, 90 L. Ed. 1611, 66 S. Ct. 980), the shipowner had the vessel under charter and the charter-party required the charterer to pay half-hire while the vessel was laid up for repairs. In a suit for collision damage, the owner claimed full charter-hire for loss of use, arguing that his receipt of half-hire was reparation from a collateral source which should be disregarded. Judge Clark's dissenting opinion agreed with the libelant. The *majority* opinion, however, held that half-hire was all the libelant *actually lost,* and so was all that he could recover.

In the *Aguiline* case the contract between libelant and a third party operated to reduce the libelant's actual loss, and was given the legal effect of reducing the quantum of recoverable damage accordingly. In our case the contract

between libelant and the Chilean Line brought into the treasury the same number of dollars for the GOLDEN GATE that would have been received had there never been a collision, thus showing that libelant-appellee sustained no actual loss of any kind. Under the *holding* of the *Aguiline* case in the majority opinion, the sale of the GOLDEN GATE prevents libelant from recovering anything more than the $250 spent for temporary repairs.

Dated, San Francisco, California,
October 24, 1952.

Respectfully submitted,
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